

NOEL S. COHEN (SBN: 219645)
ncohen@polsinelli.com
POL SINELLI LLP
2049 Century Park East, Suite 2900
Los Angeles, CA 90067
Telephone: (310) 556-1801
Facsimile: (310) 556-1802

Attorneys for Third-Party Defendants
FUJIFILM HUNT SMART SURFACES, LLC;
FUJIFILM HUNT CHEMICALS U.S.A., INC.;
FUJIFILM HOLDINGS AMERICA CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MATSON NAVIGATION COMPANY, INC.

Plaintiff,

v.

THE SHERWIN-WILLIAMS COMPANY

Defendant.

Case No. 3:17-cv-00081 EDL

(Assigned to the Honorable Elizabeth D. Laporte)

**FUJIFILM HUNT SMART SURFACES,
LLC, FUJIFILM HUNT CHEMICALS
U.S.A., INC. AND FUJIFILM HOLDINGS
AMERICA CORPORATIONS' REPLY
BRIEF ISO MOTION TO DISMISS**

THE SHERWIN-WILLIAMS COMPANY

Third-Party Plaintiff,

v.

FUJIFILM HUNT SMART SURFACES,
LLC; FUJIFILM HUNT CHEMICALS
U.S.A., INC.; FUJIFILM HOLDINGS
AMERICA CORPORATION,

Third-Party Defendant.

[Filed Concurrently with Declarations of
Patrick J. Rohan and Noel S. Cohen]

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I. INTRODUCTION

S-W¹ does not address, and therefore concedes, that the Court lacks general jurisdiction over the FUJIFILM Parties. S-W asserts instead that the Court may exercise specific jurisdiction over FHSM (and over FHUS solely as FHSM's successor) on two grounds. First, S-W contends that FHSM "was heavily involved in all aspects of the underlying transaction with Matson," including (1) communications with Matson via email from FHSM's offices in New Jersey, (2) shipment of the surface and tie coatings to S-W's San Diego store, which S-W then resold and delivered to Matson for the painting of the Vessel *in China*, and (3) approximately one month *after* the coatings had allegedly failed, attendance at a brief visual inspection of the hull at a marina in Long Beach, California. S-W Mem. at 1, 3-5 and 12. Alternatively, relying exclusively on cases involving *insurance carriers*, S-W contends that FHSM's alleged agreement under the FHSM Supply Agreement to defend and indemnify S-W "without geographical restriction" constitutes purposeful availment of the privilege of conducting activities in California. *Id.* at 1, 9-11.

Neither contention has merit. As demonstrated in movants' Opening Mem., neither the use of the mails, telephone or other means of interstate communication, nor the shipment of goods into the state, constitutes purposeful availment. In addition, FHSM's sole visit to the forum, *after* the allegedly defective paint job in China, is not only too attenuated to confer jurisdiction, but it is well settled that "[o]nly contacts occurring *prior to the event causing the litigation* may be considered" in assessing specific jurisdiction. *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 913 (9th Cir. 1990) (emphasis added).

S-W's alternative reliance on the indemnification provision of the FHSM Supply Agreement fares no better because: (i) neither the terms of FHSM Supply Agreement itself nor FHSM's alleged refusal to indemnify S-W bear any relationship with California²; (ii) FHSM is

¹ Defined terms herein have the meanings ascribed to them in movants' opening Memorandum of Points and Authorities (the "Opening Mem.").

² As discussed below, S-W, by letter dated March 1, 2017, directed its demand for indemnification to FHSM at its offices in *New Jersey* and to HLUS at its offices in *New York*, and the FUJIFILM Parties, *through counsel in New York*, responded to S-W's demand by letter dated

1 not an insurer but a *product manufacturer*, a critical distinction made in the case law cited by S-
2 W; and (iii) even if the insurance cases applied (and they do not), the event giving rise to the
3 litigation *must also take place in the forum* and, here, it is undisputed that the allegedly defective
4 paint job took place in *China*.

5 S-W's contention that FHSM should reasonably have anticipated being hauled before a
6 California court based solely on an indemnity clause "without geographical restriction" is also
7 belied by the separate insurance terms of the S-W Supply Agreement, pursuant to which FHSM
8 agreed to procure and maintain comprehensive general liability insurance and to name S-W as an
9 additional insured thereunder. *See* Kearney Decl., Ex. A, § 15. FHSM not only procured such
10 insurance, but its carrier is in fact funding S-W's defense in this action. *See* Rohan Reply Decl.,
11 Exs. C and D.

12 Regarding jurisdiction over HLUS, FHSM's and FHUS' ultimate U.S. parent corporation,
13 S-W, suggests that jurisdiction may be founded on agency theory, with FHSM's alleged in-state
14 contacts attributed to its out-of-state parent. But this is a non-starter, both because FHSM's own
15 forum contacts are insufficient and because the Supreme Court *expressly rejected* the Ninth
16 Circuit's agency theory of jurisdiction in *Daimler AG v. Bauman*, 134 S. Ct. 746, 759-60 (2014).

17 Finally, regarding dismissal of S-W's claims against HLUS pursuant to Fed. R. Civ. P.
18 12(b)(6), S-W concedes that the only party with whom it contracted was *FHSM*, but suggests that
19 HLUS may nonetheless be held liable for *FHSM's* alleged indemnity obligations on an "agency
20 theory" because: (i) the notice provision of the FHSM Supply Agreement included HLUS' Law
21 Department as a notice copy recipient; and (ii) a preprinted footer in certain FHSM emails sent to
22 S-W *after* the execution of the FHSM Supply Agreement "attempted to incorporate" certain
23 additional HLUS terms and conditions. S-W cites no authority for the first proposition (and there
24 is none), and its second contention fails because (i) S-W does not allege that these additional
25 terms *were incorporated* into the FHSM Supply Agreement; (ii) the latter provides that it may be
26 amended only by a writing signed by S-W; and (iii) these additional terms and conditions, on

27
28 March 13, 2017. *See* Exhibits A and B to the Reply Declaration of Patrick J. Rohan (the "Rohan
Reply Decl.").

1 their face, do not purport to bind HLUS to anything, much less to FHSM’s indemnity obligations.

2 **II. ARGUMENT**

3 **A. The Third-Party Complaint Should be Dismissed for Lack of Personal**
4 **Jurisdiction.**

5 **1. FHSM’s Alleged Dealings with Matson Do Not Confer Jurisdiction.**

6 While S-W asserts that FHSM was “heavily involved in the underlying transaction with
7 Matson,” even if FHSM had contracted *directly* with Matson (although it did not), these dealings
8 are insufficient to confer jurisdiction. Under the purposeful availment test, “a contract alone does
9 not automatically establish minimum contacts in the plaintiff’s home forum.” *Boschetto v.*
10 *Hansing*, 539 F.3d 1011, 1017 (9th Cir. 2008). Instead, “there must be actions by the defendant
11 *himself* that create a ‘substantial connection’ with the forum State.” *Picot v. Weston*, 780 F.3d
12 1206, 1212 (9th Cir. 2015) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)
13 (emphasis in original)); *see also Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773,
14 1783 (2017) (activities of in-state distributor did not support jurisdiction over out-of-state
15 manufacturer, especially where “it is not alleged that [the manufacturer] engaged in relevant acts
16 together with [the distributor] in California”).

17 The fact that FHSM may have sent emails or other documents to Matson in California is
18 likewise insufficient, since the “use of the mails, telephone, or other international
19 communications simply do not qualify as purposeful activity invoking the benefits and protection
20 of the [forum] state.” *Peterson v. Kennedy*, 771 F.2d 1244, 1262 (9th Cir. 1985) (citations and
21 internal quotation marks omitted); *see Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990). Nor
22 does a defendant “purposefully avail itself of a forum simply by delivering a product into the
23 state.” *Cottle v. Western Skyways Inc.*, 2017 WL 1383277, *4-6 (E.D. Cal. April 17, 2017);
24 *Boschetto*, 539 F.3d at 1017.

25 Indeed, in rejecting the “stream-of-commerce” theory of jurisdiction, the Supreme Court
26 has emphasized that “a single sale of a product in a State does not constitute an adequate basis for
27 jurisdiction over an out-of-state defendant.” *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780,
28 2792 (2011) (opinion of Breyer, J.). To the contrary, the transmission of goods will permit the

1 exercise of jurisdiction only where the defendant has engaged in *substantial* sales activities that
2 “can be said to have targeted the forum” and where those activities have resulted in harm *in the*
3 *forum itself*. *Id.* at 2788. As explained in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131
4 S. Ct. 2846 (2011):

5 [W]here ‘the sale of a product . . . is not simply an isolated occurrence, but arises from the
6 efforts of the manufacturer or distributor to serve . . . the market for its products in
7 [several] States, it is not unreasonable to subject it to suit in one of those States *if its*
8 *allegedly defective merchandise has there been the source of injury to its owner or others*.
9 *Id.* at 2855 (quoting *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980) (emphasis
10 added in *Goodyear*). *Accord Bristol-Myers Squibb*, 137 S. Ct. at 1782 (no specific jurisdiction
11 over out-of-state manufacturer where the plaintiffs did not claim to have suffered harm in
12 California and the conduct giving rise to their claims occurred elsewhere).

13 Here, FHSM plainly did not “target” its sales at California. FHSM never had offices,
14 employees or sales representatives in California, never advertised or registered to do business
15 here, and – apart from the Matson Coatings at issue – had only *de minimus* sales in California.
16 Kearney Decl., ¶¶ 18-20.³ Nor did the terms the FHSM Supply Agreement contemplate or
17 require any performance here. To the contrary, the agreement required S-W to submit orders to
18 FHSM’s “office located in *Allendale, New Jersey*” and required FHSM to deliver the Products
19 F.O.B. “its manufacturing facility in *Dayton, Tennessee*.” Kearney Decl., Exh. A, §§ 3, 5
20 (emphasis supplied). S-W’s order for the Matson Coatings itself was sent to and accepted by
21 FHSM at its New Jersey office. Kearney Decl., ¶¶ 30-31. While FHSM, as an accommodation
22 to S-W, may have shipped the coatings to San Diego, all parties clearly understood that the
23 Matson Coatings were destined for China and that the Vessel was being painted at the Shipyard in
24 China. *Id.*, ¶ 31; Third-Party Complaint, ¶¶ 10-12; First Amended Complaint, ¶¶ 6-9.

25 Just as importantly, it is undisputed that the event giving rise to this litigation – the
26

27 ³ In 2015 (its last year of operation), FHSM had no sales in California. In 2014, other than the
28 Matson Coatings at issue, its sales totaled less than \$2,000, and in 2012 and 2013 its California
sales totaled \$3,000 and \$5,000, respectively. *Id.* at ¶ 20.

1 allegedly defective coating of the Vessel – did not take place in this forum, as required under
2 *Goodyear* and *Bristol-Myers Squibb*, but in China.

3 Finally, FHSM’s sole visit to the forum, approximately one month *after* the painting of the
4 Vessel in China and the alleged failure of the coatings, to view the hull at a marina in Long
5 Beach, is clearly too attenuated to create “a substantial connection with the forum state.” *Picot*,
6 780 F.3d at 1212-1213 (defendant’s two trips to California were insufficient to create a
7 substantial connection where they were neither envisioned under the terms of the parties’ contract
8 nor “[held no] special place in [the defendant’s] performance under the agreement as a whole.”).

9 Just as importantly, in assessing specific jurisdiction, “[o]nly contacts occurring prior to
10 the event causing the litigation may be considered.” *Farmers*, 907 F.2d at 914 (9th Cir. 1990);
11 *see also Key Tronic Corp. v. Smart Techs. ULC*, 2016 WL 7104252, *7 (E.D. Wash., Dec. 5,
12 2016) (defendant’s two trips to the forum *after* it had allegedly supplied defective products and in
13 an effort to resolve the parties’ dispute were “not appropriate for consideration” of specific
14 jurisdiction); *accord Abokasem v. Royal Indian Raj Int’l Corp.*, 2011 WL 635222, * 6 (N.D. Cal.
15 Feb. 11, 2011); *Arizona School Risk Retention Trust, Inc. v. NMTC, Inc.*, 169 F.Supp.3d 931, 935
16 (D. Ariz. 2016). Here, as in *Key Tronic*, FHSM’s sole visit to the forum occurred *after* the
17 allegedly defective paint job in China and thus does not support jurisdiction.⁴

18 **2. FHSM’s Alleged Indemnity Obligation Does Not Support**
19 **Jurisdiction.**

20 S-W’s alternative contention, that FHSM purposefully availed itself of the privilege of
21 conducting business in California by virtue of the indemnity provision in the FHSM Supply
22 Agreement, fails because: (i) neither the terms of FHSM Supply Agreement itself nor FHSM’s
23 alleged refusal to indemnify S-W bear any relationship with California; (ii) FHSM is not an
24 insurer but a product manufacturer, a critical distinction raised in the case law; and (iii) even if
25 the insurance cases applied (and they do not), the event giving rise to the litigation must also take
26 place in the forum and, here, it is undisputed that the allegedly defective paint job took place in
27 _____

28 ⁴ See Declaration of Noel S. Cohen.

China.

3. FHSM’s Alleged Breach of Its Indemnity Obligations Has No Relationship to California.

As a threshold matter, neither the “indemnitor” (FHSM) nor the “indemnitee” under the FHSM Supply Agreement is a California resident,⁵ the agreement was not negotiated in California (Kearney Decl. ¶ 22), and it is expressly governed by *Ohio* law. *Id.*, Ex. A, § 18(d). Moreover, while courts will examine the parties’ written contract to determine whether its terms “required any aspect of performance to occur in California” (*Cottle*, 2017 WL 1383277, * 7; *Picot*, 780 F.3d at 1212), the FHSM Supply Agreement neither references California nor required any performance here. To the contrary, the FHSM Supply Agreement required S-W to submit orders to FHSM’s “office located in *Allendale, New Jersey*” and required FHSM to deliver the Products F.O.B. “its manufacturing facility in *Dayton, Tennessee*.” Kearney Decl., Ex. A, §§ 3, 5 (emphasis supplied). The Matson order itself was sent to and accepted by FHSM at its New Jersey office. Kearney Decl., ¶ 31.

It is also undisputed that neither S-W’s demand for indemnification nor FHSM’s purported rejection of the same took place in California. Rather, by letter dated March 1, 2017 (Rohan Reply Decl. Ex. A), S-W directed its demand for indemnification to FHSM at its offices in *New Jersey* and to HLUS at its offices in *New York*, and the FUJIFILM Parties, through counsel in *New York*, responded to this demand by letter dated March 13, 2017. Rohan Reply Decl. Ex. B.

While Matson has sued S-W in California, and the latter has demanded that FHSM appear and defend it here, “it is the defendant’s conduct that must form the necessary connection with the forum State” and “a defendant’s relationship with a plaintiff or a third party, standing alone, is an insufficient basis for jurisdiction.” *Walden v. Fiore*, 134 S. Ct. 1115, 1122-23 (2014).

The Am. Ins. Co. v. R&Q Reinsurance Co., 2016 WL 5930589 (N.D. Cal. Oct. 12, 2016),

⁵ FHSM is a (former) *Delaware* company based in New Jersey, and S-W is an *Ohio* corporation based in Cleveland. Third-Party Complaint, ¶¶ 4, 6.

1 is instructive. There, the plaintiff insurer, which was headquartered in California, paid out
2 millions of dollars in losses and demanded indemnity from – and later brought suit in California
3 against – the defendant reinsurer, which was incorporated and headquartered in Pennsylvania. In
4 holding that the court lacked specific jurisdiction over the defendant, the court noted that it was
5 undisputed that the defendant’s decision to reject Plaintiff’s reinsurance claims was made at its
6 Pennsylvania headquarters and that the underlying agreements themselves were negotiated in
7 Illinois. *Id.* at *3. The court noted further that neither the fact that the plaintiff was a *California*
8 indemnitee, nor the facts that the defendant had extensive telephone and email communications
9 with the plaintiff *and* made trips to the forum to audit the plaintiff’s claims, sufficed to establish
10 jurisdiction, explaining that “the Supreme Court has consistently rejected efforts to establish
11 specific jurisdiction purely through an out-of-state defendant’s connections with an in-state
12 plaintiff.” *Id.* (citing *Walden*, 134 S. Ct. at 1122).

13 Here, S-W’s attempt to base specific jurisdiction on the indemnity provision of the FHSM
14 Supply Agreement is *even weaker*, since S-W is not a California indemnitee and the FHSM
15 Supply Agreement itself bears no relationship to California. *See also Sibley v. Superior Court*, 16
16 Cal. 3d 442, 447-48 (1976) (*en banc*) (negotiation and execution of guaranty agreement out of
17 state, by nonresident guarantor, in favor of California resident, insufficient to confer jurisdiction).

18 **4. The Insurance Cases Cited by S-W Do Not Apply.**

19 In *Farmers*, the case principally relied on by S-W, the court held that where an automobile
20 liability insurer issued a policy with a nationwide scope of coverage *and* where its insureds were
21 involved in an accident in the forum state, the insurer has purposefully availed itself of the
22 privilege of conducting business there. *Farmers*, 907 F.2d at 913 (explaining that the insurer had
23 purposefully availed itself of the forum because “[i]ts policy coverage extends into Montana and
24 an insured event resulted in litigation there.”). In so holding, the court was careful to distinguish
25 the situation of a liability insurer, whose sole “product” is the defense and indemnity of claims,
26 from a manufacturer or distributor, as follows:

27 Unlike the automobile sellers in *World-Wide Volkswagen*, automobile liability insurers
28 contract to indemnify and defend the insured for claims that will foreseeably result in

1 litigation in foreign states. . . . Thus litigation requiring the presence of the insurer is not
2 only foreseeable, but it was purposefully contracted for by the insurer. *Moreover, unlike a*
3 *product seller or distributor, an insurer has the contractual ability to control the territory*
4 *into which its "product" — the indemnification and defense of claims — will travel.*

5 *Id.* at 914 (emphasis supplied).

6 *Farmers* and its progeny are thus clearly inapplicable for two fundamental reasons. First
7 and foremost, FHSM is not an insurer but a product manufacturer *with no ability to control the*
8 *territory into which its products will travel*, especially where, as here, it had appointed
9 independent resellers such as S-W. To permit the exercise of jurisdiction over FHSM wherever
10 its products travelled would revive the discredited “stream-of-commerce” theory of jurisdiction
11 which has been rejected repeatedly by the Supreme Court and Ninth Circuit. *See World-Wide*
12 *Volkswagen*, 444 U.S. at 295-96 (explaining that “foreseeability alone has never been a sufficient
13 benchmark for jurisdiction” and rejecting a regime where “every seller of chattels would in effect
14 appoint the chattel his agent for service of process”); *see also Holland Am. Line Inc., v. Wartsila*
15 *N. Am., Inc.*, 485 F.3d 450, 459 (9th Cir. 2007) (“placement of a product into a stream of
16 commerce, without more, is not an act purposefully directed toward the forum”).

17 Second, it is undisputed that the “insured event” – the allegedly defective coating of the
18 Vessel – took place in China, and not in this forum. Thus, even if FHSM were an insurer, these
19 cases simply would not apply. *See Hawthorne v. Mid-Continent Cas. Co.*, 2017 WL 1233116, *4
20 (W.D. Wa. April 4, 2017), explaining that under *Farmers* and its progeny:

21 [W]here an insurance agreement covers risk in all fifty states, an insured event occurs in
22 one of those states, and *the suit for which the insured seeks the insurer's defense is filed in*
23 *that same state*, the insurer purposefully avails itself of that state's forum by voluntarily
24 assuming the obligation to appear and defend against suits arising from that insured event.
25 (Emphasis in original).⁶

26
27 ⁶ The additional insurance and indemnity cases cited by S-W are also clearly
28 inapposite. In *Flintkote Co. v. Gen. Accident Ass. Co. of Canada*, 2004 WL 1977220 (N.D. Cal.
Sept. 7, 2004), the court upheld jurisdiction over a nonresident *insurer* which issued liability

1 Finally, while the Supreme Court has emphasized that foreseeability alone is an
2 insufficient basis for jurisdiction, S-W's contention that FHSM should reasonably have
3 anticipated being haled before a California forum based solely on the indemnity clause of the
4 FHSM Supply Agreement is belied by the separate insurance terms of the S-W Supply
5 Agreement, pursuant to which FHSM agreed to procure and maintain comprehensive general
6 liability insurance and to name S-W as an additional insured thereunder, including "with a broad
7 form of vendor's endorsement." Kearney Decl., Ex. A, § 15. FHSM not only procured such
8 insurance in favor of S-W, but FHSM's carrier is in fact funding S-W's defense in this action. *See*
9 Rohan Reply Decl., Exs. C and D. Thus, in the event of a defective product claim, such as that
10 alleged here, FHSM reasonably anticipated that its insurance carrier would respond, not that
11 FHSM itself would be subject to jurisdiction in far-flung venues, regardless of its own contacts
12 with the forum, and "without geographic restriction."

13 **5. The Controversy Does Not Arise from FHSM's Contacts With**
14 **the Forum.**

15 Regarding the second prong for specific jurisdiction – that is, "whether plaintiffs' claims
16 would have arisen but for [the defendant's] contacts with California," (*Doe v. Unocal Corp.*, 248
17 F.3d 915, 924 (9th Cir. 2001)), it is undisputed that FHSM's only relevant contact with the forum
18 is the mere happenstance the Matson Coatings were shipped to San Diego as a convenience to S-
19 W and in transit to their ultimate destination at the Chinese Shipyard, where the Vessel was

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21
22 policies without geographic restriction to "a company based principally in California" which
23 faced asbestos liability in 100,000 cases, "many of which . . . are being heard in California courts
24 regarding events that took place in California." *Id.* at *1, 3. In *Hirsch v. Blue Cross, Blue Shield*
25 *of Kan. City*, 800 F.2d 1474 (9th Cir. 1986), the court upheld jurisdiction over a nonresident
26 insurer that issued a group health policy to a multi-state trucking company based in Kansas and
27 covering its employees wherever located. The court found that the defendant had knowingly
28 accepted enrollment in the plan by the plaintiff, a California resident, and upheld jurisdiction with
respect to the plaintiff's medical claims arising in California. *Id.* at 1479-80. *Am. Induction*
Techs., Inc. v. KBK, Inc., 2012 WL 12888112 (C.D. Cal. April 17, 2012), involved indemnity
claims by a California-based distributor which had an ongoing contractual relationship with a
Chinese manufacturer, based on claims of patent infringement arising out of the California
distributor's sale of the defendant's products in California.

1 painted.⁷ But this fortuitous circumstance in no sense “caused” the alleged defective painting of
2 the Vessel, and the results clearly would have been the same if the Matson Coatings had been
3 shipped FOB FHSM’s plant in Tennessee, per the terms of the FHSM Supply Agreement, or
4 shipped directly to China. *See, e.g., Scott v. Breeland*, 792 F.2d 925, 928 (9th Cir. 1986) (in
5 action arising out of alleged assault of flight attendant in Nevada, the fact that the defendants
6 changed planes in California was not a causative factor); *World-Wide Volkswagen*, 444 U.S. at
7 295 (dismissing as a “fortuitous circumstance” and “isolated event” the fact that the automobile
8 sold by defendants in New York happened to suffer an accident while passing through
9 Oklahoma).

10 Recognizing a lack of “but for” causation with respect to the painting of the Vessel in
11 China, S-W argues in the alternative that FHSM’s alleged refusal to defend and indemnify it in
12 *this action* is a but-for cause of S-W’s claims against it. S-W Mem. at 15. But this is a bootstrap
13 argument, premised solely on what FHSM has allegedly *declined to do* in the forum, and cannot
14 be squared with the Supreme Court’s recent pronouncements in *Goodyear, Walden* and other
15 recent cases, in which the Court has significantly narrowed the scope of specific jurisdiction and
16 repeatedly emphasized that it is the defendant’s *own affirmative conduct* “that must form the
17 necessary connection with the forum State.” *Walden*, 134 S. Ct. at 1122-23.⁸ Indeed, *Hunt v.*
18 *Erie Ins. Grp.*, 728 F.2d 1244 (9th Cir. 1984), the court cogently explained that an insurer’s failure
19 to structure its policy to *exclude* coverage in a given state is not conduct aimed at the forum, since
20 the purposeful avilment test “does [not] focus on what the *defendant* has *failed* to do within a
21 state.” *Id.* at 1246-47 (emphasis in original). Other Circuit and state supreme courts have
22 likewise assailed the notion that an insurer’s failure to exclude coverage in a given state, *or to*
23

24 _____
25 ⁷ FHSM’s attendance at the hull survey in Long Beach one month *after* the Vessel was painted in
26 China is obviously not a causative or “but for” factor. In addition, “[o]nly contacts occurring
27 prior to the event causing the litigation may be considered” for specific jurisdiction. *Farmers*,
28 907 F.2d at 913.

⁸ It is also noteworthy that every one of the insurance and indemnity cases cited by S-W was
decided *prior* to the Supreme Court’s pronouncements in *Goodyear, Walden* and *Bristol-Myers*
Squibb.

1 defend its insured there, constitutes “purposeful availment.” See , i.e., *OMI Holdings Inc. v.*
2 *Royal Insurance of Canada*, 149 F.3d 1086, 1094 (10th Cir. 1998) (“[W]hether a defendant may
3 foresee that a plaintiff may attempt to implead it into an action in a foreign forum is of little
4 relevance in determining whether a defendant has established minimum contacts with that
5 forum.”).

6 **6. Exercise of Jurisdiction Would Be Unfair and Unreasonable.**

7 As explained in *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1487-88 (9th Cir.
8 1993), the smaller the degree of the defendant’s purposeful injection into the forum, the less
9 jurisdiction is to be anticipated and the less reasonable it would be for the forum to exercise
10 jurisdiction. Here, FHSM’s injection into the forum is virtually *non-existent*, both with respect to
11 the claims at issue and with respect to sales activity generally. The other reasonableness factors
12 also weigh in FHSM’s favor. Regarding the burden of defending S-W’s claims here, FHSM (and
13 FHUS as its successor) is a small company with employees and operations on the east coast only.
14 Moreover, FHSM’s insurance carrier *is already providing a defense to S-W* in this action.
15 California itself has no interest in adjudicating S-W’s indemnity claims, because neither S-W nor
16 FHSM is a California resident and the FHSM Supply Agreement expressly provides that its
17 governed by Ohio law. Kearney Decl., Exh. A, § 11(d). In addition, S-W clearly has alternative
18 forums where it can assert its indemnity claims against FHSM and/or FHUS as its successor.

19 **7. The Court Lacks Jurisdiction Over HLUS.**

20 As noted above, S-W suggests that the Court may exercise jurisdiction over HLUS,
21 FHSM’s and FHUS’ ultimate U.S. parent, based on agency theory, with FHSM’s alleged in-state
22 contacts attributed to HLUS. But this contention is meritless, both because FHSM’s own forum
23 contacts are insufficient and because the Supreme Court *expressly rejected* the Ninth Circuit’s
24 agency theory of jurisdiction in *Daimler AG v. Bauman*, 134 S. Ct. 746, 759-60 (2014).

25 **B. The Third-Party Complaint Fails to State a Claim Against HLUS.**

26 Finally, regarding dismissal of S-W’s claims against HLUS pursuant to Fed. R. Civ. P.
27 12(b)(6), S-W concedes that the only party with whom it contracted was *FHSM*, but suggests that
28 HLUS may somehow be liable for *FHSM*’s alleged indemnity obligations on an “agency theory”

1 because: (i) the notice provision of the FHSM Supply Agreement included HLUS' Law
2 Department as a notice copy recipient; and (ii) a preprinted footer in certain FHSM emails sent to
3 S-W *after* the execution of the FHSM Supply Agreement "attempted to incorporate" certain
4 additional HLUS terms and conditions.

5 S-W cites *no authority*, and offers no logic or rationale, for the proposition that the
6 inclusion of an affiliate's law department as a mere *notice copy recipient* in a contract renders that
7 affiliate liable on the contract. It is utterly routine to include a party's outside law firm or, here, a
8 related law department as a notice copy recipient, and this obviously does not render the law firm
9 or affiliate liable on the contract.

10 S-W's second contention, based on the "attempted" incorporation of certain boilerplate
11 FUJIFILM terms and conditions (the "FUJIFILM TCs," annexed as Ex. E to the Declaration of
12 Brian McDonald) is clearly unavailing because (i) S-W does not allege that these additional terms
13 *were in fact incorporated* into the FHSM Supply Agreement; (ii) the FHSM Supply Agreement
14 itself provides that it may be amended *only by a writing signed by S-W* (Kearney Decl. Ex. A at §
15 18(a)); and (iii) the FUJIFILM TCs, on their face, *do not even refer to HLUS*, much less include
16 indemnity terms or purport to bind HLUS to its affiliates' indemnity obligations. To the contrary,
17 the opening paragraph of the FUJIFILM TCs expressly states that these supplemental terms are
18 for use "by the FUJIFILM U.S. entity contracting to provide products and/or services ("Vendor")
19 to Customer ("Buyer")."⁹

20 Finally, if the FUJIFILM TCs *had* been incorporated into the parties' agreement, they
21 would also be dispositive of the FUJIFILM Parties' jurisdictional motion, since the concluding
22 paragraph provides that the buyer (*i.e.*, S-W) "irrevocably and unconditionally" submits to the
23 jurisdiction of the state and federal courts located in Westchester County, New York for the
24 resolution of all disputes.

25
26
27 ⁹ As explained in the Prutting Declaration (¶ 3), HLUS is the holding company for FUJIFILM's
28 U.S. operating companies, does not provide goods or services to the public, and thus is not a
"vendor."

1 **III. CONCLUSION**

2 For all the forgoing reasons, Third-Party Defendants respectfully ask the Court to grant
3 this Motion.
4

5 Dated: August 14, 2017

POLSINELLI LLP

6 

7
8 By: _____ Noel S. Cohen

9 Attorneys for Third-Party Defendants
10 FUJIFILM HUNT SMART
11 SURFACES, LLC;
12 FUJIFILM HUNT CHEMICALS
13 U.S.A., INC.;
14 FUJIFILM HOLDINGS AMERICA
15 CORPORATION
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CERTIFICATE OF SERVICE

I am over the age of 18 and not a party to the within action; I am employed by POLSINELLI LLP in the County of Los Angeles, California at 2049 Century Park East, Suite 2900, Los Angeles, California 90067.

On August 14, 2017, I served the foregoing document(s) described as:

**FUJIFILM HUNT SMART SURFACES, LLC, FUJIFILM HUNT
CHEMICALS U.S.A., INC. AND FUJIFILM HOLDINGS AMERICA
CORPORATIONS' REPLY BRIEF ISO MOTION TO DISMISS;
DECLARATIONS OF NOEL S. COHEN AND PATRICK J. ROHAN IN
SUPPORT THEREOF**

on the interested parties in this action by:

[X] **By CM/ECF:** I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses denoted on the Electronic Mail notice list, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants (if any) indicated on the Manual Notice list/Service List.

[X] **(Federal)** I declare under penalty of perjury under the laws of the State of California and under the laws of the United States of America that the above is true and correct.

Executed on August 14, 2017, at Los Angeles, California.

/s/ Noel Cohen

Noel Cohen